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Cedric Wong King Ti v Shim Yen Lin

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)(NCVC)-888–04 OF 2021
LEE SWEE SENG, RAVINTHRAN AND GHAZALI CHA JJCA
30 APRIL 2023

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Civil Procedure — Injunction — Mareva injunction — Appeal against decision of judicial commissioner in dismissing application to set aside ex parte Mareva injunction and inter parte Mareva injunction — Whether Justice of the Peace in Sabah empowered to attest affidavits — Whether affidavit defective — Whether appeal against setting aside of ex parte Mareva injunction which had lapsed was academic — Whether s 11 of Courts of Judicature Act 1964 and O 41 rr 7 and 8 of the Rules of Court 2012 complied with — Whether requirements of Mareva injunction were satisfied — Courts of Judicature Act 1964 s 11 — Rules of Court 2012 O 2 r 1, O 41 rr 4, 7 & 8 — Sabah Oaths Ordinance (Cap 89) — Subordinate Courts Act 1948 s 2 & Fourth Schedule

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A company known as Sunlight Aqua Sdn Bhd which was set up by both the appellant and the respondent had managed to obtain endorsement and funding for a prawn farming project from the Sabah Foundation. Subsequently, the respondent sued the appellant for fraudulently setting up another company known as Sunlight Seafood to enter into an agreement with a subsidiary of Sabah Foundation. The court found in favour of the respondent and pursuant to the said judgment ('the said judgment'), the respondent had obtained ex parte Mareva injunction. In response, the appellant applied to set aside and discharge the ex parte Mareva injunction as well as the respondent's inter parte application for Mareva injunction. The judicial commissioner ('the JC') dismissed the appellant's application and found, inter alia, that a Justice of the Peace ('JP') in Sabah was empowered by law to attest affidavits and even if it were otherwise, the defect was curable under O 2 r 1 of the Rules of Court 2012 ('the ROC') and was therefore admissible under O 41 r 4 of the ROC. In relation to the merits of the Mareva injunction application, the JC found that the appellant had a good arguable case and that the appellant had assets within the jurisdiction. Further, His Lordship found that the terms of the ex parte order were not onerous or oppressive as there was evidence that the respondent would have sold her share of Sunlight Aqua Sdn Bhd for RM30m to a potential buyer had the the project not been diverted to other companies by the appellant. Disgruntled with the decision, the appellant filed the present appeal. The issues arose were: (a) whether a JP in Sabah could affirm affidavits; (b) whether the appeal was academic — in relation to this issue the respondent argued that since the ex parte injunction order had lapsed and fresh affidavits

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had been sworn before a commissioner for oaths for the ad interim injunction application and to oppose the setting aside application, the appeal was academic; (c) whether s 11 of the Courts of Judicature Act 1964 ('the CJA') and O 41 rr 7 and 8 of the ROC were complied with in this case; (d) whether such an affidavit was wholly defective; and (e) whether the requirements for a Mareva injunction were satisfied.

Held, dismissing the appeal with costs of RM10,000 to the respondent subject to the payment of allocatur:

(1) The JC cited s 11 of the CJA and found that a JP in Sabah had the power to attest an affidavit under it for the reason he was deemed to be a second class magistrate. However, the court disagreed with the JC's finding for two reasons. Firstly, the Fourth Schedule of the Subordinate Courts Act 1948 ('the SCA') stated that some public officers were, by virtue of office, deemed to be First Class or Second Magistrates. For example, an assistant registrar of the subordinate court was an ex officio second class magistrate. But the schedule did not state the converse, ie, it did not deem that a second class magistrate was also an assistant registrar. Secondly, the JC erred in referring to the definition of 'Registrar' in s 2 of the SCA because the definition of such word ought to be discerned from the CJA itself. The CJA limited the meaning to all ranks of registrars of the superior courts only and not the registrars of subordinate courts. Therefore, even if a JP was deemed to be an assistant registrar of the subordinate courts, he or she could not come within the ambit of s 11(a) of the CJA. For the above reasons, a JP in Sabah who was deemed to be second class magistrate could not attest affidavits for general use in civil proceedings unless specially authorised by law (see paras 19–20 & 22–23).

(2) The Sabah Oaths Ordinance (Cap 89) could not apply to affidavits as it only referred to oaths and affirmations administered to a witness in a judicial proceeding. In addition, the defect in question was not a mere irregularity in form as the attestation was made before an unauthorised person. For the same reason, the court found it difficult to agree with the respondent that O 2 of the ROC could cure the defect (see para 25).

(3) The court found that the appeal was academic because the ex parte Mareva injunction had lapsed and considering that the ex parte Mareva injunction and the subsequent inter parte ad interim Mareva injunction as well as the inter parte Mareva injunction were all distinct and separate orders, the defect of the ex parte Mareva injunction did not affect the subsequent fresh order such as the Mareva injunction granted after full argument (see paras 26–28).

(4) The JC found that the test for a Mareva injunction had been satisfied by the respondent for the following reasons: (a) the respondent had obtained

judgment against the appellant and all appeals against the said decision had been dismissed, as such, a good arguable case had been established by the respondent; (b) the respondent had disclosed sufficient affidavit evidence to prove that there were assets within the jurisdiction; and (c) the learned judge via the said judgment had found that the appellant had fraudulently concealed the fact that he set up Sunlight Seafood to replace Sunlight Aqua to enter into a joint venture with a subsidiary of Sabah Foundation, as such, the risk of dissipation could be inferred. The court agreed with the JC's finding that there was a real risk of dissipation of assets by the appellant before the court could assess the damages payable to the respondent. The court further found that in the memorandum of appeal, the appellant did not raise any ground of appeal in respect of the finding of the JC that the respondent satisfied the test for the grant of a Mareva injunction (see paras 33 & 35).

(5) The court found no merit in the appellant's ground of appeal that the terms of the Mareva injunction order were 'oppressive and onerous and far too wide as well as ambiguous in its terms'. This was because the upper limit of RM30m specified in the Mareva injunction order in respect of the value of assets that must not be removed from Malaysia was not fixed arbitrarily by the JC because such figure was based on the finding of the judge in the said judgment that one Nobel Pang had agreed to buy the respondent's shares in Sunlight Aqua for RM30m. The court also found that the ancillary order for disclosure of information in para 4 of the ex parte order that was adopted in the inter parte order was not too wide or oppressive. The disclosure order was prayed in aid of the Mareva injunction as without it, the respondent would have no knowledge of the assets of the appellant. However, considering that there was no upper limit specified in respect of disclosure of assets, the court varied para 4 to read that the extent of the disclosure by the appellant of his assets be limited to unencumbered assets to the tune of RM30m only (see para 36).

[Bahasa Malaysia summary

Sebuah syarikat dikenali sebagai Sunlight Aqua Sdn Bhd yang ditubuhkan oleh kedua-dua perayu dan responden telah berjaya mendapatkan pengesahan dan pembiayaan untuk projek ternakan udang daripada Yayasan Sabah. Responden kemudiannya memfailkan saman ke atas perayu kerana menubuhkan syarikat lain yang dikenali sebagai Sunlight Seafood secara fraud untuk memeterai perjanjian dengan anak syarikat Yayasan Sabah. Mahkamah membuat keputusan yang memihak kepada responden dan berdasarkan penghakiman tersebut ('penghakiman tersebut'), responden telah memperoleh injunksi Mareva ex parte. Bertindak balas daripada itu, perayu memohon untuk mengenepikan dan membatalkan injunksi Mareva ex parte tersebut serta permohonan inter parte responden untuk injunksi Mareva. Pesuruhjaya

kehakiman ('PK') menolak permohonan perayu dan mendapati, antara lain, bahawa seorang 'Justice of the Peace' ('JP') di Sabah diberi kuasa oleh undang-undang untuk mengesahkan afidavit dan walaupun sebaliknya, kecacatan tersebut boleh diperbetulkan di bawah A 2 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') dan oleh itu boleh diterima di bawah A 41 k 4 KKM 2012. Berhubung dengan merit permohonan injunksi Mareva, PK mendapati perayu mempunyai kes yang boleh dipertikaikan dan perayu mempunyai aset dalam bidang kuasa mahkamah. Selanjutnya, Yang Arif mendapati bahawa terma perintah ex parte tersebut tidak membebankan atau menindas kerana terdapat bukti bahawa responden akan menjual sahamnya dalam Sunlight Aqua Sdn Bhd pada harga RM30 juta kepada bakal pembeli sekiranya projek tersebut tidak dialihkan kepada syarikat lain oleh perayu. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu-isu yang timbul ialah: (a) sama ada JP di Sabah boleh mengesahkan afidavit; (b) sama ada rayuan telah menjadi akademik — berhubung dengan isu ini responden berhujah bahawa oleh kerana perintah injunksi ex parte telah luput dan afidavit baharu telah diikrarkan di hadapan pesuruhjaya sumpah untuk permohonan injunksi ad interim dan untuk menentang permohonan pengenepian, rayuan telah menjadi akademik; (c) sama ada s 11 Akta Mahkamah Kehakiman 1964 ('AMK') dan A 41 kk 7 dan 8 KKM 2012 telah dipatuhi dalam kes ini; (d) sama ada afidavit tersebut adalah cacat sepenuhnya; dan (e) sama ada syarat-syarat untuk injunksi Mareva telah dipenuhi.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000 kepada responden tertakluk kepada bayaran alokatur:

(1) Pesuruhjaya kehakiman memetik s 11 AMK dan mendapati JP di Sabah mempunyai kuasa untuk mengesahkan afidavit atas sebab dia dianggap sebagai majistret kelas kedua. Bagaimanapun, mahkamah tidak bersetuju dengan penemuan PK tersebut atas dua sebab. Pertama, Jadual Keempat Akta Mahkamah Rendah 1948 ('AMR') menyatakan bahawa sesetengah pegawai awam, disebabkan oleh jawatannya, disifatkan sebagai majistret kelas pertama atau kedua. Sebagai contoh, penolong pendaftar mahkamah bawahan ialah ex officio majistret kelas kedua. Tetapi jadual tersebut tidak menyatakan sebaliknya, iaitu, ia tidak menganggap bahawa majistret kelas kedua juga merupakan penolong pendaftar. Kedua, PK terkhilaf apabila merujuk kepada takrifan 'Pendaftar' dalam s 2 AMR kerana takrifan perkataan tersebut sepatutnya didapati daripada AMK itu sendiri. Akta Mahkamah Kehakiman 1964 menghadkan takrifan tersebut kepada semua pangkat pendaftar mahkamah atasan sahaja dan bukan pendaftar mahkamah bawahan. Oleh itu, walaupun JP dianggap sebagai penolong pendaftar mahkamah bawahan, dia tidak termasuk dalam peruntukan s 11(a) AMK. Atas alasan-alasan di atas, JP di Sabah yang dianggap sebagai majistret kelas kedua tidak boleh mengesahkan afidavit untuk kegunaan am dalam prosiding sivil

melainkan dibenarkan secara khusus oleh undang-undang (lihat perenggan 19–20 & 22–23). A

(2) Sabah Oaths Ordinance (Cap 89) tidak boleh diguna pakai untuk afidavit kerana ia hanya merujuk kepada sumpah dan ikrar yang diberikan kepada saksi dalam prosiding kehakiman. Di samping itu, kecacatan dalam kes ini bukanlah satu bentuk ketidakaturan semata-mata kerana pengesahan tersebut dibuat di hadapan orang yang tidak mempunyai kuasa. Atas sebab yang sama, adalah sukar untuk mahkamah bersetuju dengan responden bahawa A 2 KKM 2012 boleh memperbetulkan kecacatan tersebut (lihat perenggan 25). B C

(3) Mahkamah mendapati rayuan ini telah menjadi akademik kerana injunksi Mareva ex parte tersebut telah luput dan memandangkan kesemua injunksi Mareva ex parte dan seterusnya injunksi Mareva ad interim inter parte serta injunksi Mareva inter parte adalah perintah yang berbeza dan berasingan, kecacatan injunksi Mareva ex parte tidak menjejaskan perintah baharu berikutnya seperti injunksi Mareva yang diberikan selepas penghujahan penuh (lihat perenggan 26–28). D

(4) Pesuruhjaya kehakiman mendapati bahawa ujian untuk injunksi Mareva telah dipenuhi oleh responden atas alasan-alasan berikut: (a) responden telah mendapatkan penghakiman terhadap perayu dan semua rayuan terhadap keputusan tersebut telah ditolak, oleh itu, satu kes yang boleh dipertikaikan telah dibuktikan oleh responden; (b) responden telah menunjukkan keterangan afidavit yang mencukupi untuk membuktikan bahawa terdapat aset dalam bidang kuasa; dan (c) hakim yang bijaksana melalui penghakiman tersebut telah mendapati perayu telah secara fraud menyembunyikan fakta bahawa dia telah menubuhkan Sunlight Seafood untuk menggantikan Sunlight Aqua untuk mengadakan usaha sama dengan anak syarikat Yayasan Sabah, oleh itu, risiko pelesapan boleh dianggap. Mahkamah bersetuju dengan penemuan PK bahawa terdapat risiko sebenar pelesapan aset oleh perayu sebelum mahkamah boleh menilai ganti rugi yang perlu dibayar kepada responden. Mahkamah selanjutnya mendapati bahawa dalam memorandum rayuan, perayu tidak membangkitkan alasan-alasan rayuan berkenaan dengan dapatan PK bahawa responden telah memenuhi ujian untuk pemberian injunksi Mareva (lihat perenggan 33 & 35). E F G H

(5) Mahkamah mendapati tiada merit dalam alasan rayuan perayu bahawa terma perintah injunksi Mareva adalah 'oppressive and onerous and far too wide as well as ambiguous in its terms'. Ini kerana had atas RM30 juta yang dinyatakan dalam perintah injunksi Mareva tersebut yang berhubung dengan nilai aset yang tidak boleh dikeluarkan dari Malaysia tidak ditetapkan sewenang-wenangnya oleh PK kerana angka tersebut adalah berdasarkan kepada dapatan hakim dalam penghakiman tersebut bahawa seorang Nobel Pang telah bersetuju untuk membeli saham I

responden dalam Sunlight Aqua pada harga RM30 juta. Mahkamah juga mendapati perintah sampingan untuk penzahiran maklumat dalam perenggan 4 perintah ex parte yang diterima pakai dalam perintah inter parte tidak terlalu luas atau menindas. Perintah penzahiran tersebut dipohon sebagai bantuan bagi injunksi Mareva kerana tanpanya, responden tidak akan mengetahui tentang aset perayu. Walau bagaimanapun, memandangkan tiada had atas yang dinyatakan berhubung dengan penzahiran aset, mahkamah mengubah perenggan 4 tersebut di mana tahap penzahiran perayu berkenaan dengan asetnya dihadkan kepada aset tanpa beban sehingga jumlah RM30 juta sahaja (lihat perenggan 36).]

Cases referred to

Hong Kim Sime, ex p Malayan Banking Bhd, Re [1994] 3 MLJ 261; [1994] 3 CLJ 646, HC (refd)

Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605; [1996] 3 CLJ 483, CA (refd)

RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd [2002] 3 MLJ 1; [2002] 3 CLJ 83, CA (distd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 10(4), 11, 11(a)
Criminal Procedure Code s 424
Insolvency Act 1967 s 128, 128(a)
Justices of the Peace Ordinance 1961 s 4(1)
Rules of Court 2012 O 1A, O 2, O 2 r 1, O 29 r 1(2B), 1(2BA), O 41 rr 4, 7, 8
Oaths Ordinance (Cap 89) s 9
Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 reg 2
Subordinate Courts Act 1948 ss 2, 99(2), Fourth Schedule

Appeal from: *Shim Yen Lin v Cedric Wong King Ti* [2021] 11 MLJ 350 (High Court, Kota Kinabalu)

Jeyan Marimuttu (with Eric Chong) (J Marimuttu & Partners) for the appellant.
Alexdecena @ Alexander Decena (with Jordan Christian Kong Tzu Fui) (Jayasuriya Kah & Co) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] This is an appeal against the dismissal of the appellant's application to discharge an ex parte Mareva injunction order and the grant of the inter parte Mareva injunction order. The said orders were granted in favour of the respondent who had obtained judgment in respect of liability against the appellant in 2015. The assessment of damages was still pending at the time the post judgment injunction orders were granted on 11 January 2021 and 26 April 2021.

BACKGROUND FACTS

[2] The brief background facts are as follows. The appellant and respondent entered into an agreement to invest in a joint venture project involving prawn farming (the Pitas Project). For that purpose, Sunlight Aqua Sdn Bhd was set up as the joint venture vehicle. The appellant held 51% of the shares in the company whereas the respondent held 49% of the shares. The company managed to obtain endorsement and funding for the project from a governmental body, ie the Sabah Foundation. Subsequently, the respondent sued the appellant for fraudulently setting up another company to enter into an agreement with a subsidiary of Sabah Foundation. After a full trial, the High Court found the appellant liable for breach of contract and fraudulent concealment and ordered damages to be assessed. Judgment against the appellant was entered on 30 December 2015. The decision of High Court was affirmed by the Court of Appeal and Federal Court. The matter is now pending assessment of damages before the High Court.

MAREVA INJUNCTION APPLICATION

[3] Pending the assessment of damages, the respondent filed for a post judgment Mareva injunction (encl 140) on ex parte basis. The essential order sought was that the appellant must not remove from Malaysia any of his assets up to the value of RM30m and in any way dispose of or deal with the same to diminish its value. The prohibition sought extends to monies in bank, real estate and shares in companies. The respondent also applied for disclosure of details of the assets and liabilities of the appellant in aid of the Mareva injunction.

[4] The grounds of the application were as follows. Judgment on liability had been entered in favour of the respondent. The appellant has assets within the jurisdiction. There is a real risk of dissipation of assets. The RM30m upper limit in respect of assets that the appellant must not remove from Malaysia was arrived at in the following way. In the affidavit in support of the ex parte

application, the respondent deposed that the High Court made a finding that an investor had agreed to buy 49% of the shares of Sunlight Aqua Sdn Bhd from the respondent for the said price.

APPLICATION TO DISCHARGE MAREVA INJUNCTION ORDER

[5] The learned judicial commissioner heard the ex parte application in encl 140 and granted the ex parte Mareva injunction on 11 January 2021. On 26 January 2021, the appellant filed a notice of application in encl 169 to set aside and discharge the ex parte injunction order. The decision of the learned judicial commissioner to dismiss encl 169 and the subsequent grant of the inter parte Mareva injunction order on 26 April 2021 is the subject of this appeal.

[6] The main ground of appeal to discharge the ex parte order was that the affidavit in support was not properly affirmed as it was attested before a Justice of the Peace (JP). Apart from that ground, counsel for the appellant also raised some procedural grounds. The application for ex parte injunction and the unsealed copy of the order that were served on the appellant on 12 January 2021 did not have a return date. The sealed copy of the ex parte Mareva injunction order was not served within seven days of the order. The above-mentioned grounds were also raised in the form of preliminary objections to the inter parte application of the respondent for the grant of the Mareva injunction.

DECISION OF HIGH COURT

[7] The application of the appellant to discharge the ex parte order and the inter parte application of the respondent for the Mareva injunction were all heard together. It must be noted that the inter parte application of the respondent for an ad interim application prior to the hearing of the setting aside application was supported by a fresh affidavit that was attested by a commissioner of oaths. The affidavit in reply of the respondent to the affidavit in support of the appellant to set aside the ex parte order was also attested by a commissioner for oaths. The learned judicial commissioner dismissed the application of the appellant to discharge the ex parte order and granted the inter parte application of the respondent for the grant of the Mareva injunction on 26 April 2021.

[8] His Lordship held that a JP in Sabah is empowered by law to attest affidavits. Even if it were otherwise, he said that the defect is curable under O 2 r 1 and is therefore admissible under O 41 r 4 of the Rules of Court 2012. In respect of the absence of a return date, the learned judicial commissioner noted that the initial date that was given by the court was converted to an e-review date due to the imposition of the Movement Control Order (MCO) in 2021.

He dismissed the objection of the appellant as no prejudice was occasioned. In respect of the two-day delay in the service of the sealed ex parte order, the learned judicial commissioner found that it was due to the imposition of the MCO and therefore dismissed it after citing O 1A of the Rules of Court 2012.

[9] In respect of the merits of the Mareva injunction application, the learned judicial commissioner found that the appellant has a good arguable case and that the appellant has assets within the jurisdiction.

[10] His Lordship also found that the terms of the ex parte order were not onerous or oppressive as there was evidence that the respondent would have sold her share of Sunlight Aqua Sdn Bhd for RM30m to a potential buyer had the 'Pitas Project' not been diverted to other companies by the appellant.

ISSUES

[11] The notice of appeal was directed against the decision of the learned judicial commissioner to dismiss the application to discharge the ex parte injunction order and at the same time to grant the inter parte Mareva injunction order. The learned judicial commissioner dismissed the application to set aside the ex parte order for the reasons that we summarized earlier. Before us, counsel for the respondent also argued that since the ex parte injunction order had lapsed and fresh affidavits had been sworn before a commissioner for oaths for the ad interim injunction application and to oppose the setting aside application, the appeal is academic. Thus, the issues in this appeal are as follows:

(a) the main issue whether a JP in Sabah can affirm affidavits;

(b) whether the appeal is academic?

(c) whether s 11 of the Courts of Judicature Act 1964 and O 41 rr 7 and 8 of the Rules of Court 2012 were complied with in this case;

(d) whether such an affidavit is wholly defective; and

(e) whether the requirements for a Mareva injunction were satisfied?

Whether a JP in Sabah can attest affidavits?

[12] The learned judicial commissioner held that a JP can attest affidavits for general use in the Sabah courts. We observe that this decision is without any precedent. Thus far, the only court decision that approved the use of an affidavit attested by a JP in Sabah concerned a bankruptcy matter. The High Court and the Federal Court in that case relied on a provision of the then Bankruptcy Act 1967 to validate the said affidavit. We shall briefly discuss the said decision and reasons of the learned judicial commissioner to hold that an

affidavit attested by a JP in Sabah can be used for general court proceedings.

[13] In *Re Hong Kim Sime, ex p Malayan Banking Bhd* [1994] 3 MLJ 261; [1994] 3 CLJ 646, the issue at hand was whether a Sabah JP was legally competent to attest an affidavit used to verify a creditor's petition. Ian Chin J firstly looked at the law that authorised affirmation of affidavits in the High Court which is s 11 of the Courts of Judicature Act 1964 ('the CJA 1964'). It reads as follows:

> (1) Any Registrar and any person appointed by the Chief Justice to be a Commissioner for Oaths (subject to any limitations expressed in his appointment) may do all or any of the following things:
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> (a) receive acknowledgments of married women in all cases where acknowledgments are required by law to be taken before a public officer;
>
> (b) receive acknowledgments of recognizances of bail and bail-bonds;
>
> (c) administer oaths for —
>
> (i) the justification for bail;
>
> (ii) taking any affidavit or affirmation;
>
> (iii) receiving and taking the answer, plea, demurrer, disclaimer, allegation or examination of any party or parties to any action;
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> (iv) the examination of any witnesses upon any interrogatories or *de bene esse* or in chief or on any other occasions;
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> (v) swearing executors and administrators; and
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> (vi) swearing persons in any action, matter or proceeding, which is pending or about to be instituted in any court in any of its jurisdictions; and
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> (d) take and receive statutory declarations.
>
> (2) The Chief Justice may make rules for the appointment, conduct, fees to be charged by and for all things appertaining to Commissioners for Oaths and persons appointed by him under subsection (1).

[14] His Lordship observed that 'Registrar' would include deputies and assistants. This observation is supported by s 3 of the Courts of Judicature Act 1964. The other category of persons is a commissioner of oaths. Thus, His Lordship concluded that a JP is not authorised under s 11 to attest an affidavit. However, s 128(a) of the Bankruptcy Act 1967 (now Insolvency Act 1967) authorised a magistrate to attest an affidavit for use in the bankruptcy court in Malaysia. His Lordship then considered s 4(1) of the Justices of the Peace Ordinance 1961 of Sabah which reads as follows:

> Every Justice of the Peace shall be authorised and is hereby required to administer oaths and affirmations, take and receive statutory declarations and attest signatures

under any written law or when otherwise required to do so as though such Justice of the Peace were a Magistrate. A

[15] It was pointed out by the learned judicial commissioner in the instant case that the Justices of the Peace Ordinance 1961 of Sabah was repealed by the time of the decision in the *Hong Kim Sime* case. However, we note that Ian Chin J also considered reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 which was made pursuant to s 99(2) of the Subordinate Courts Act 1948 ('the SCA 1948'). Regulation 2 is similarly worded as s 4(1) of the Justices of the Peace Ordinance 1961. It reads as follows: B C

2 Every Justice of the Peace shall be authorised and is required:

(a) to administer oaths and affirmations;

(b) to make and receive statutory declarations; and

(c) to attest signatures, D

under any written law or when otherwise required to do so *as though such Justice of the Peace were a Second Class Magistrate.* (Emphasis added.)

[16] Ian Chin J then concluded that under the above-mentioned provisions, a JP in Sabah is deemed to be a second class magistrate and therefore can attest an affidavit for the purpose of bankruptcy proceedings. The Court of Appeal upheld the decision of Ian Chin J. The Federal Court also upheld the said decision. The Federal Court judgment is reported as *Re Hong Kim Sime, ex p Malayan Banking Bhd* [1994] 3 MLJ 261; [1994] 3 CLJ 646. Chong Siew Fai CJ at the Federal Court held that a JP in Sabah can administer oaths and affirmations as he or she were a second class magistrate under s 99(2) of the SCA 1948 and reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990. Therefore, under s 128(a) of the Bankruptcy Act 1967, a JP is competent to attest an affidavit as a second class magistrate. E F G

[17] The learned judicial commissioner in the instant case noted that the Federal Court did not say that a JP cannot attest an affidavit in a non-bankruptcy case. His Lordship then proceeded to hold that a JP in Sabah can do so for the following reasons. Under the Fourth Schedule of the SCA 1948, an assistant registrar of the subordinate courts is an ex officio second class magistrate. Under s 2 of the SCA 1948, 'registrar' includes an 'assistant registrar' of the subordinate courts. His Lordship then considered the general law that authorises the taking of affidavits which is s 11 of the Courts of Judicature Act 1964. It authorises a 'Registrar' to attest an affidavit. Therefore, the learned judicial commissioner reasoned that a JP in Sabah is empowered to attest affidavits for 'any legal proceedings in the subordinate courts and the High Court'. H I

Section 11 of the CJA 1964

[18] We note that the only general provision that refers to the taking of affidavits is s 11 of the CJA 1964. There is no general provision in the Rules of Court 2012 or its predecessor Rules of High Court 1980 or the Subordinate Court Rules 1980 that governs the taking of affidavits. There is no general provision in the SCA 1948 in respect of the attestation of affidavits either. That is the reason for the reference to s 11 of the Courts of Judicature Act 1964 in the *Hong Kim Sime* case by the High Court and the Federal Court. In the *Hong Kim Sime* case, as we pointed out earlier, both the Federal Court and High Court had also regard to another provision, ie s 128 of the Bankruptcy Act 1967 that permits attestation of an affidavit by a Magistrate. This is the reason, the taking of an affidavit by a JP in Sabah who is deemed to be a second class magistrate was held to be valid. Likewise, there may well be a provision in other laws that permits the taking of an affidavit by a magistrate. One such law is s 424 of the Criminal Procedure Code which provides that an affidavit used in criminal courts may be sworn before a magistrate.

[19] Coming back to the facts of the instant case, s 11 of the Courts of Judicature Act 1964 was cited by the learned judicial commissioner. His Lordship found that a JP in Sabah has the power to attest an affidavit under it for the reason he is deemed to be a second class magistrate. However, we are of the view that His Lordship erred in holding that the JP can avail this provision to attest an affidavit for general use in civil proceedings for two reasons.

[20] His Lordship held that since an assistant registrar of the subordinate courts is an ex officio second class magistrate, a JP is also an assistant registrar. In other words, His Lordship conflated the office of a second class magistrate with that of the assistant registrar. We should think that he erred in doing so. The Fourth Schedule of the SCA 1948 enacts that some public officers are, by virtue of office, deemed to be first class or second magistrates. For example, a State Secretary is an *ex officio* first class magistrate and an assistant registrar of the subordinate court is an *ex officio* second class magistrate. But the schedule does not state the converse, ie it does not deem that a second class magistrate is also an 'assistant registrar'. Therefore, it is wrong to say that because an assistant registrar is an *ex officio* second class magistrate, the latter is also an assistant registrar. Otherwise, a first class magistrate would also be deemed to be a State Secretary merely because the latter is an *ex officio* first class magistrate. The public officers listed in the Fourth Schedule are *ex officio* magistrates only because of a specific provision to that effect in the law.

[21] However, we would hasten to add that unlike a second class magistrate, a first class magistrate is also a 'Registrar' because of s 10(4) of the Courts of Judicature Act 1964. The said provision enacts that first class magistrates are

also senior assistant registrars of the High Court if its registry is within the local limits of their jurisdiction.

[22] In our view, the second error of the learned judicial commissioner is this. His Lordship had regard to the definition of 'Registrar' in s 2 of the SCA 1948 which includes an 'assistant registrar'. However, the meaning of 'Registrar' in s 11 of the Courts of Judicature Act 1964 should be discerned from the Act itself. The Act limits the meaning to all ranks of Registrars of the Superior Courts only. There is no reference to the Registrars of Subordinate Courts. In the premises, even if a JP is deemed to be an assistant registrar of the subordinate courts, he or she cannot come within the ambit of s 11(a) of the Courts of Judicature Act 1964. But as we said earlier, a JP in Sabah is deemed to be a second class magistrate for the limited purpose of reg 2 of the Subordinate Courts (Powers of Justices of the Peace) (Sabah) Regulations 1990 only. There is no provision in any law that deems that a JP is also an assistant registrar of the subordinate courts.

[23] For all the above reasons, we are of the view that a JP in Sabah who is deemed to be second class magistrate cannot attest affidavits for general use in civil proceedings unless specially authorised by law such as s 128 of the Insolvency Act 1967.

[24] Counsel for the respondent urged us to hold that the attestation of an affidavit in support of the ex parte application by JP is a mere irregularity that cannot invalidate evidence. He cited s 9 of the Sabah Oaths Ordinance (Cap 89) that states as follows:

> No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

[25] In our view, the said ordinance cannot apply to affidavits as it only refers to oaths and affirmations administered to a witness in a judicial proceeding. Secondly, the defect question is not a mere irregularity in form as the attestation was made before an unauthorised person. For the same reason, we find it difficult to agree with counsel for the respondent that O 2 of the Rules of Court 2012 can cure the defect. However, we find that the part of the appeal against the grant of the ex parte order is academic. We shall address this issue below.

Whether appeal against ex parte order is academic?

[26] Counsel for the respondent argued that regardless whether the affidavit to support the ex parte Mareva injunction is defective, the instant appeal

against the grant of it is academic and therefore the appeal should be dismissed. The reason for this argument is that the ex parte Mareva injunction in question has lapsed and a fresh inter parte injunction was granted. We find merit in this argument for the following reasons.

[27] The ex parte Mareva injunction which is the subject of the instant appeal was granted on 11 January 2021. Order 29 r 1(2B) provides that unless earlier revoked or set aside, an ex parte interim injunction shall automatically lapse 21 days from the date it was granted. In the premises, the ex parte order lapsed on 1 February 2021. On the same date, the respondent applied for an ad interim injunction on inter parte basis. The application was supported by a fresh affidavit sworn before a commissioner of oaths on 29 January 2021. An ad interim Mareva injunction was granted on 1 February 2021. The Mareva injunction was granted on 26 April 2021.

[28] As correctly pointed out by counsel for the respondent, the ex parte Mareva injunction order and the subsequent *inter parte ad interim* Mareva injunction and inter parte Mareva injunction orders are distinct and separate orders. In *RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd* [2002] 3 MLJ 1; [2002] 3 CLJ 83, this court held that an *ad interim* order made after expiry of the ex parte injunction order is a fresh order and not an extension of the ex parte order. It follows that since the *ad interim* Mareva injunction order is a separate order and not an extension of the previous ex parte order, it is not affected by any defect in the latter order. Similarly, the Mareva injunction granted after full argument is also a fresh order. In the premises, the appeal against the ex parte Mareva injunction order is academic and, on this ground, we dismiss it.

[29] We are mindful that in the *RIH Sevices* case, it was stated that the court could still consider whether a lapsed ex parte injunction order should have been made in the first place not for the purpose of setting it aside but to determine whether damages that should be awarded. An inquiry as to damages would be ordered if there was inequitable conduct on the part of the plaintiff such as non-disclosure of material facts or misrepresentation in the application for the ex parte injunction. However, in the instant case, the main complaint is based on a technicality, ie that the first affidavit in support was sworn before a JP. For this reason, we see no reason to order any inquiry as to damages in respect of the lapsed ex parte order.

[30] Before we proceed to consider the appeal against the inter parte Mareva injunction order, for sake of completeness, we observe that before the learned judicial commissioner, some procedural points were argued by the counsel for the appellant. It was argued that the ex parte Mareva injunction order that was served on the appellant's solicitors was not endorsed with a return date.

Furthermore, the sealed copy of the ex parte Mareva injunction order dated 11 January 2021 was not served within seven days in accordance with O 29 r 1(2BA). The learned judicial commissioner dismissed the above-mentioned issues raised in the form of preliminary objections and gave detailed reasons. We find it unnecessary to address the above issues at any length as the appellant did not raise them in the memorandum of appeal. In any event, we agree with the learned judicial commissioner who accepted the explanation for non-compliance and delay and found that no prejudice was occasioned.

[31] Before us, the issue of delay in applying for the Mareva injunction as the judgment on liability was pronounced in 2015 was also raised. This ground of appeal was pleaded in the memorandum of appeal. This issue does not appear to have been addressed by the learned judicial commissioner. In the instant case, it is apparent that the respondent was alerted to the risk of dissipation when she became aware of the intention of the appellant to sell 80% of his shares in Sunlight Seafood in December of 2020. The ex parte application was made in January of 2021. Thus, we find no merit in this ground of appeal.

Appeal against inter parte Mareva injunction order

[32] Insofar as the inter parte order is concerned, we are of the view that the respondent can rely on the affidavits that were attested before the commissioner for oaths. These affidavits refer to the contents of the earlier affidavit sworn before the JP. However, as these affidavits were properly attested, we see no reason why the respondent could not have relied on it. In any event, the basic fact that judgment against the appellant on liability had been granted is not disputed. And in para 32 of the affidavit in opposition, the appellant has agreed that he has entered into a sale and purchase agreement to transfer his shares in Sunlight Seafood Sabah. In the premises, the learned judicial commissioner had sufficient admissible evidence before him to consider whether there was an arguable case and whether there was risk of dissipation.

[33] As we said earlier, the learned judicial commissioner found that the test for a Mareva injunction prayed had been satisfied by the respondent. The respondent had obtained judgment against the appellant and all appeals against the said decision had been dismissed. Therefore, a good arguable case had been established by the respondent. In respect of the issue whether there were assets within the jurisdiction, His Lordship held that the respondent had disclosed sufficient affidavit evidence to prove that fact. In respect of the crucial issue of risk of dissipation of assets, His Lordship had regard to the fact that Justice Gabriel Gumis had earlier found as a fact in 2015 that the appellant fraudulently concealed the fact that he set up Sunlight Seafood to replace Sunlight Aqua as the company to enter into a joint venture with a subsidiary of

Sabah Foundation. For this reason, His Lordship held that the risk of dissipation could be inferred.

[34] The learned judicial commissioner held as follows in respect of the risk of dissipation of assets:

> Where there has been a breach of contract and dishonesty, the courts were inclined to find that there was a real risk of dissipation. *Bumi Armada Navigation Sdn Bhd v Mirza Marine Sdn Bhd* [2015] MLJU 953; [2015] 5 CLJ 652 and *Rosnah bt Kamarul Zaman & Ors v Extreme Chocolate Sdn Bhd & Anor* [2011] 7 MLJ 249; [2010] 1 LNS 113 are both cases where the High Court found that as a result of the breach of contract and breach of payment terms of the settlement agreement respectively, the breaching party was held to have lacked honesty and probity. For that reason, the risk of dissipation could be inferred.
>
> ... His Lordship judicial commissioner Gabriel Gumis (as he then was) in his grounds of judgment dated 30 December 2015 found that the defendant had breached the contract and had fraudulently concealed the fact that he incorporated Sunlight Seafood to replace Sunlight Aqua as the company to enter into a joint venture with Inno Resource to develop the Pitas Project.

[35] For the same reasons, we do not disagree with the finding of the learned judicial commissioner that there is a real risk of dissipation of assets by the appellant before the court can assess the damages payable to the respondent. We also note that in the memorandum of appeal, the appellant did not raise any ground of appeal in respect of the finding of the learned judicial commissioner that the respondent satisfied the test for the grant of a Mareva injunction.

[36] The appellant pleaded in the memorandum of appeal that the terms of the Mareva injunction order were 'oppressive and onerous and far too wide as well as ambiguous in its terms'. We find no merit in this ground of appeal for the following reasons. In *Motor Sports International Ltd (servants or agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605; [1996] 3 CLJ 483, this court held that where a plaintiff claims an exact sum, a Mareva injunction that restrains the defendant from dissipating his asset must specify an upper limit and that if does not, the order would be too wide and oppressive. In the instant case, the upper limit specified in the Mareva injunction order in respect of the value of assets that must not be removed from Malaysia is RM30m. This figure was not fixed arbitrarily by the learned judicial commissioner in the instant case as the High Court when granting judgment on liability in 2015 made a finding that one Nobel Pang had agreed to buy the respondent's shares in Sunlight Aqua for RM30m. We are also of the view that the ancillary order for disclosure of information in para 4 of the ex parte order that was adopted in the inter parte order is not too wide or oppressive. The disclosure order was prayed in aid of the Mareva injunction as without it, the

respondent would have no knowledge of the assets of the appellant. Any dissipation of the assets of the appellant would render the judgment of the High Court that was rendered in favour of the respondent in 2015 nugatory. However, we shall vary para 4 as there is no upper limit specified in respect of disclosure of assets. In the premises, we shall vary the inter parte order dated 26 April 2021 to read that the extent of the disclosure by the appellant of his assets be limited to unencumbered assets to the tune of RM30m only.

CONCLUSION

[37] In summary, whilst we agree with counsel for the appellant that a JP in Sabah is not authorised to attest an affidavit for use in general civil proceedings, by operation of law, the ex parte order in question has automatically lapsed. Therefore, the appeal against the grant of it is academic. We find it unnecessary to consider ordering an inquiry into damages because there is plainly no inequitable conduct on the part of the respondent in applying for the ex parte order. The only error committed was technical, ie, it was assumed based on the *Hong Kim Sime* case, a JP in Sabah could attest the affidavit in support. In respect of the inter parte Mareva injunction order, we were satisfied that the learned judicial commissioner had correctly found that the test for the grant of it had been satisfied.

[38] For all the above reasons, we dismissed the appeal subject to the variation that disclosure of assets be limited to unencumbered assets to the tune RM30m only. We granted costs of RM10,000 to the respondent subject to payment of allocatur.

Appeal dismissed with costs of RM10,000 to respondent subject to payment of allocatur.

Reported by Dzulqarnain Ab Fatar